UNITED STATES
v.
ESTATE OF W. R. WOOD

IBLA 77-455 Decided February 16, 1978

Appeal from decision of Administrative Law Judge Dean F. Ratzman, declaring certain mining claims null and void. Contest CA-2883.

Affirmed in part, reversed in part.

1. Administrative Procedure: Generally--Rules of Practice: Government Contests

Where the Bureau of Land Management brings a contest complaint against unpatented mining claims, naming as contestee only the estate of the deceased claimant, proper service of process upon the court appointed administrator, executor, or personal representative of the deceased claimant is necessary in order to affect the interests of all the heirs of the deceased.

2. Administrative Procedure: Generally--Rules of Practice: Government Contests

Heirs of a deceased mining claimant who personally respond without protest or objection to a government contest complaint which names as contestee only the estate of their intestate decedent will be bound by the result of such contest insofar as it purports to affect their interest in that estate, even though service on the estate itself was faulty.

3. Mining Claims: Discovery: Generally

A lode mining claim is properly declared null and void in the absence of a showing

> of a discovery on the claim of a lode or vein bearing mineral which would warrant a prudent man to further expend his labor and means in the reasonable expectation of developing a valuable mine.
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> Evidence of mineralization which may justify further exploration, but not development of actual mining operations, is not sufficient to establish that a discovery of a valuable mineral deposit has been made.

APPEARANCES: William B. Murray, Esq., Portland, Oregon, for Contestees; Charles F. Lawrence, Esq., Office of the General Counsel, U.S. Department of Agriculture, San Francisco, California, for the Government.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Appellants, sub nomine Estate of Walter R. Wood, appeal from a decision of Administrative Law Judge Dean F. Ratzman, dated June 20, 1977, which, following a hearing in Mineral Contest CA-2883, declared null and void certain mining claims. 1/ The contest complaint, dated July 3, 1975, which resulted in this decision was brought by the California State Office, Bureau of Land Management, at the request of the Forest Service, U.S. Department of Agriculture, and named as Contestee, the Estate of Walter R. Wood, Rodney Wood, Administrator. 2/ The complaint alleges, inter alia, that there are not presently disclosed within the limits of the claims minerals of a variety subject to the mining laws sufficient in quantity, quality, and value, to constitute a discovery under the mining laws, that the lands at

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1/ The claims involved are The Fox Mine, formerly known as January; Candaleria Copper Mine, a/k/a Canadalana; E. Valena Mine, a/k/a Evelena Claim and Evalena; Triangler Quartz Mining Claim; Managenes No. 2 Mine; White-House Quartz Mining Claim, a/k/a White Horse; Duck Mine; Gass Mine; Banar No. 2 Mine, a/k/a Baner No. 2 and Banner No. 2; and Thy Angler Clame, a/k/a Thry Angler Mine Quarter Mining Claims, situated in the W 1/2 of Sec. 1, T. 33 N., R. 4 W., M.D.M., Shasta County, California, within the Shasta National Forest and the Whiskeytown-Shasta-Trinity National Recreation Area. 16 U.S.C. § 460q et seq. (1970).

2/ Service of the complaint on Rodney Wood was accomplished July 9, 1975, as evidenced by the certified mail return receipt card.

issue are nonmineral in character, that the claims are not held in good faith for mining purposes, and that the annual assessment work has not been performed as required by the mining laws. Judge Ratzman, in his decision, found that there had been no discovery on the claims and that the claims were not held in good faith for mining purposes. We agree with these conclusions but find that, as a matter of law, this decision can affect only the fractional portion of the claims which is vested in Rodney Wood and B. Victor Wood, heirs at law of Walter R. Wood.

The contest complaint named only the Estate of Walter R. Wood, and was served only on Rodney Wood, alleging his capacity as Administrator of the Estate. 3/ On appeal, however, Rodney Wood, through counsel, denies any such capacity and points out that the Estate of Walter R. Wood has never been probated and that no executor, administrator, or personal representative has ever been appointed to supervise the descent of Walter R. Wood's property. This deficiency in the complaint was not raised at the hearing although Rodney Wood, together with his brother, B. Victor Wood, personally appeared at the hearing and contested the merits of the case.

Appellants argue that a contest cannot be tried piecemeal and that all heirs of a decedent must be named in one proceeding, so, since the several sons and heirs of W. R. Wood were not so named in the complaint or served in this proceeding, the contest should be dismissed. They cite Johnson v. Udall, 292 F. Supp. 738 (D.C. C.D. Calif., 1968), in support of their position. Johnson held that where prior to filing a contest complaint, parties interested in an unpatented mining claim included heirs of a contestee, but the heirs were not so named in the complaint nor were their addresses and ages given, the complaint was not sufficient to comply with the requirements of the regulation pertaining to filing of contest proceedings, and that where proper service was not made upon each contestee named in the complaint, regulations required that complaint be dismissed against all contestees as of a time prior to taking of default. At the time of Johnson, the Department's rules of practice provided, at 43 CFR 1852.1-4, that the complaint shall contain the names and addresses of each party interested, including the age of each heir of any deceased entryman, and at 43 CFR 1852.1-5, that the complaint must be served upon every contestee,

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3/ The Forest Service had advised BLM that the subject claims were owned by the Estate of W. R. Wood, a/k/a Walter R. Wood, Rodney Wood, Administrator. It is noted that Rodney Wood answered the complaint as "Rodney Wood, Administrator, Estate of W. R. Wood."

with penalty of summary dismissal of the complaint if the complaint is not served upon each contestee, but that if a contestee answers the complaint prior to summary dismissal and without questioning the service, any defect in service will be deemed waived. Because one of the contestees had died prior to issuance of the contest complaint, it was incorrect for the Department to have proceeded without complying with its own regulations regarding heirs of contestees. However, following Johnson, the Department's rules of practice were amended. Effective upon publication on November 24, 1970, at 35 FR 17996, 43 CFR 1852.2-2 was amended by addition of a new section (b) which reads as follows: "A Government contest complaint will not be insufficient and subject to dismissal for failure to name all parties interested, or for failure to serve every party who has been named." Following recodification, published at 36 FR 7186 on April 15, 1971, this language is now found at 43 CFR 4.451-2(b). Accordingly, appellant's motion to dismiss the contest for failure to serve all owners of the claims must be denied.

[1] The threshold inquiry which must preface any resolution of this appeal is an inquiry into the actual state of title with respect to these claims at the time of the complaint and hearing. The Wood brothers, on appeal, portray themselves as "the heirs of W. R. Wood." 4/ This assertion stands undisputed in the record and, for purposes of this appeal, we will assume its correctness.

The presently applicable section of the California Probate Code (in effect since 1874) reads as follows:

> § 300. Decedent's property; passage of title; possession of executor or administrator; charges
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> When a person dies, the title to his property, real and personal, passes to the person to whom it is devised or bequeathed by his last will, or in the absence of such disposition, to the persons who succeed to his estate as provided in Division 2 of this code; * * *. [5/]

The effect and intent of this section are made clear in a California Code Examiner's Note which states:

4/ While the complaint names only the Estate of Walter R. Wood as Contestee, we will, for purposes of practical clarity, refer to the three sons of said Walter Wood as "contestees," the sons appearing to be the true parties in interest.
5/ Appellant's Brief, p. 3.

> The amendment [of Civ.C. § 1384] here made [in 1874] restores the law as it stood before the code. Great embarrassment must often follow from the adoption of any other rule leading to questions as to where the title remains after the death of the intestate, and before the appointment of administrator, and also upon the death or resignation of an administrator or executor. [6/]

The foregoing interpretation by the Code Examiner is given judicial weight and force by the case of Larrabee v. Tracy, 104 P.2d 61, 39 C.A. 2d 593 (1940), holding that immediately upon the death of an ancestor, his estate, both real and personal vests at once, by the single operation of law, in his heir. We therefore find that the whole of Walter R. Wood's interest in the subject claims passed, at the moment of his death in 1937, to his legal heirs, including his sons Rodney, B. Victor, and W. S. Wood. This being the case, Rodney Wood, in his personal capacity was powerless to affect the interests of his two brothers and service, upon Rodney, of a complaint against "the Estate of Walter Wood" was not proper notice of a proceeding which later appeared to assert jurisdiction over all the individual interests of the several brothers.

[2] The notice requirements applicable to a contest such as the one before us are set forth at 43 CFR 4.450-5 which states that, "When the contest is against the heirs of a deceased entryman, the notice shall be served on each heir."

Notice in this case was served on only one heir, and even that notice was technically defective. We find, however, that these defects were waived by both Rodney Wood and B. Victor Wood, since they appeared at the proceeding below without questioning the service. This result follows from 43 CFR 4.450-5(a) which reads:

> (a) Summary dismissal; waiver of defect in service. If a complaint when filed does not meet all the requirements of § 4.450-4(a) and (c), or if the complaint is not served upon each contestee as required by this section, the complaint will be summarily dismissed by the manager and no answer need be filed. However, where prior to the summary dismissal of a complaint a contestee answers without questioning the service or proof of service of the complaint, any defect in service will be deemed waived as to such answering contestee.

6/ California Probate Code, § 300 (1974).

This provision also acts to nullify Contestee's objection on appeal, to the undated complaint which initiated the proceeding below 7/ and we find, in more general terms, that the two Wood brothers who appeared at the hearing were "reasonably apprised of the issues in controversy," Cella v. United States, 208 F.2d 783, 789 (7th Cir. 1953), cert. denied, 347 U.S. 1016, 74 S. Ct. 864, 98 L. Ed. 1138, so that the fundamental requirements of due process were met as to them. Swift and Co. v. United States, 393 F.2d 247, 252 (7th Cir. 1968). The test of the adequacy of notice and pleadings in an administrative proceeding differs greatly from the approach of the Common Law:

> [T]he question on review is not the adequacy of the * * * pleading but is the fairness of the whole procedure. Absent particularity of pleadings, the conduct of a party may readily be tantamount to a submission to adjudication and, especially in an administrative proceeding, such adjudication may be based on facts arising subsequent, as well as prior, to the filing of those pleadings.

Curtis Wright Corporation v. National Labor Relations Board, 347 F.2d 61, 73 (3rd Cir. 1965).

The third Wood brother, W. S. Wood, has not entered an appearance and we find that the proceedings below did not affect any of his interest in these claims. 8/ We observe, moreover, that the

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7/ Ibid, fn. 2. While the complaint served on Rodney Wood may have been undated, the postal receipt in the record shows that Rodney Wood received it on July 9, 1975, fully 18 months prior to the hearing in the case.

8/ We note, with some considerable concern, that Rodney Wood, who was accompanied by counsel at the time, stated, at the hearing below, (Tr. 83), that he was administrator of his father's estate. While this statement was made just before Rodney Wood was sworn as a witness, we are at a loss as to how appellants and their counsel, having made this statement for the record, can now seek to deny that Rodney Wood was ever administrator of the estate. It appears, moreover, that Rodney Wood and his counsel were not, at the time of the hearing, ignorant as to the legal status of the elder Wood's estate. Indeed, the assertion that Rodney stood as his father's administrator followed immediately after a discussion of the status of the estate between appellants' attorney and the Government counsel, Charles Lawrence. In the course of this discussion, Mr. Lawrence inquired as to the status of the subject claims and was told by Rodney's attorney that the estate of the elder Wood had never been probated (Tr. 81). Immediately thereafter (Tr. 83), Rodney stated himself to be the administrator.

record before us does not show conclusively that the three sons of Walter R. Wood are, in fact, the only heirs to his alleged interest in these claims since the exact status and disposition of W. R. Wood's estate has been asserted only in uncorroborated and inconsistent statements by appellants. None of these defects, however, impair the jurisdiction which the Judge below acquired over Rodney Wood and B. Victor Wood by virtue of their appearance, without objection, at the hearing of January 19, 1977.

[3] Turning to the merits of the government's complaint, we can see no reason to disturb Judge Ratzman's findings of fact and conclusions of law. We agree with the opinion below which held, firstly, that the Government established a prima facie case, through the testimony of its mineral examiner, Emmett B. Ball Jr., qualified as an expert witness, who examined the subject claims on four occasions, took six samples from the claims, and submitted testimony as to the quality of mineralization which assays of the samples revealed. Mr. Ball concluded that a prudent man would not be justified in the expenditure of time, money, and effort on the contested claims with the expectation of developing a paying mine (Tr. 33). This opinion, based largely on the absence of visible mineralization and low assay values revealed by the samples, was sufficient to raise a presumption that appellants had made no valuable discovery of mineralization on the claims. Verrue v. United States, 457 F.2d 1202 (9th Cir. 1972).

Appellants, in their attempt at rebutting the Government's allegations, relied heavily upon assay reports on samples from the contested claim, two of which reports contained no information about the assayer or methods of assay. Appellants have failed subsequently to provide such information although they have been afforded the opportunity to do so, and Rodney Wood himself agreed that the various spectrographic analyses merely suggest that additional inquiry might be made, the analyses being inadequate to justify commencement of mining operations at this time (Tr. 145-6).

Contestees argue, on appeal, that the Government failed to establish its prima facie case by "substantial evidence," and argue

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fn. 8 (continued)

Since no proof of Rodney Wood's alleged authority, other than the above testimony appears in the record, we assume that his recent denial of authority represents the true state of affairs. We make this assumption only since the burden of showing such authority rests with the Government as a necessary element of its prima facie case against the nonresponding Wood brother, W. S. Wood.

that it was error for Judge Ratzman to fail to pass upon each of their 49 requested findings of fact. The applicable section of the Administrative Procedure Act (APA), 5 U.S.C. § 557(c) states that: "Before a recommended, initial, * * * decision, * * * the parties are entitled to a reasonable opportunity to submit * * * (1) proposed findings and conclusions; * * *." (Emphasis added.) The following excerpt from the opinion below adequately addresses and describes the largely irrelevant character of these requested findings.

> The attorney for the Wood brothers filed approximately 15 pages of requested findings of fact and conclusions of law. However, the requested findings are interlarded with (1) references to mining that occurred approximately sixty years ago on claims in Section 36, to the north of the contested claims, (2) accounts of activity many years ago at a smelter at Heroult which is no longer operating, (3) generalities concerning a manganese bearing porphyry which is observable in an adjacent township, and colors and coatings on gossan and "iron cap" found on the contested claims, (4) references to general testimony about fault zones, transportation courses, fracture patterns, sulphide deposits and intrusive rock, (5) statements contending that minerals were produced and sold from one of the contested claims, based on conclusions of one Logan who reportedly has corrected or modified material in Bulletin 152, Manganese in California, Exhibit 8, and (6) descriptions of drilling and other work on claims not involved in this contest.

Clearly these were not the findings of fact and law contemplated by the APA, supra. There was no error in Judge Ratzman's refusal to pick through these proposed findings, and Appellants' APA rights were adequately satisfied.

We have considered the proposed findings and conclusions submitted, and, except to the extent that they have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts or because they are not relevant to the rulings that have been made. See National Labor Relations Board v. Sharples Chemicals, Inc., 209 F.2d 645 (6th Cir. 1954); United States v. Zweifel, 11 IBLA 53, 80 I.D. 323 (1973).

As to appellants' argument that the Government failed to establish its prima facie case by "substantial evidence", we find that the testimony of Emmett B. Ball, standing alone, was sufficient to meet the "substantial evidence" test of the APA. When the Government contests a mining claim on a charge of lack of discovery of a

valuable mineral deposit, it bears the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to show by a preponderance of the evidence that a discovery has been made. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). A prima facie case is established when a Government mineral examiner gives his expert opinion that he examined the claim and found insufficient values to support a finding of discovery. United States v. Bechthold, 25 IBLA 77 (1976). We find, furthermore, that appellants failed to rebut the presumption of invalidity which Mr. Ball's testimony raised. Evidence of mineralization which may justify further exploration but not the commencement of actual mining operations is not sufficient to establish that a discovery of a valuable mineral deposit has been made. United States v. Hanson, 26 IBLA 300 (1976); U.S. v. Bechthold, supra.

In summary, we find no error in the conclusion reached below that, "the contestees have not provided justification for their long stay on the public lands occupied by the 10 lode claims under consideration." The record before us leads us to concur with Judge Ratzman's conclusion that these lands are not presently 9/ held in good faith for mining purposes.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed inasmuch as it declares null and void the interests of B. Victor Wood and Rodney Wood, but reversed inasmuch as it purports to affect the interest of W. S. Wood and any other heirs at law of Walter R. Wood.

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Douglas E. Henriques
Administrative Judge

We concur:

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Edward W. Stuebing
Administrative Judge

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Martin Ritvo
Administrative Judge

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9/ The lands here at issue were withdrawn from mineral entry by P.L. 89-336, November 18, 1965. The government's proof, however, tended to show that no discovery had ever been made on the contested claims, and little reference was made below, to the effective date of the withdrawal.